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OFFICE OF PETITIONS

In re Application of :
Magerlein, et al. :
Application No. 10/771,817 : ON PETITION
Filed: June 16, 2004 :
Attorney Docket No. FIS9-2000-0412- :
US2

This is a decision on the petition filed on June 16, 2004, requesting that the above-identified application be accorded a filing date of February 3, 2004, including Figures 3I and 3J, as described in the specification.

The application was submitted on February 3, 2004. However, on May 7, 2004, the Office of Initial Patent Examination (OIPE) mailed a "Notice Of Omitted Item(s) In A Nonprovisional Application" (Notice) that stated the application had been accorded a filing date, and that Figures 3I and 3J appear to have been omitted.

In response, on May 24, 2004, the instant petition and one (1) sheet of drawings containing Figures 3I and 3J were submitted.

Petitioner states:

"The sheet 11/24 of the drawings which was inadvertently included with the present application was a duplicate of sheet 10/24 of the drawings. A new sheet 11/24 of the drawings is submitted herewith for substitution for the sheet 11/24 in the present application.

Reference was made at page 1, lines 3-4 of the present application to the parent application as follows:

"This application is a continuation in part of U.S. patent application of Brofman et al Serial No.: 09/870,531, filed on 31 May 2001."

The parent application was published as Brofman et al. Dec. 5, 2002 as U.S. Patent Application Publication No. US 2002/0180013 A1 dated therein, copies of which are attached hereto including FIGS. 3I and 3J."

Furthermore, petitioner states Figures 3I and 3J are not new matter as they were disclosed in the parent application.

Petitioners request that, "February 3, 2004 should be maintained as the filing date for this application, since FIGS. 3I and 3J were previously disclosed in the parent application Serial No.: 09/870,531; filed on 31 May 2001."

The argument has been considered, but is not persuasive. Petitioner is reminded that while the specification filed on February 3, 2004 referred to the present application as a "continuation-in-part" of application No. 09/870,531, petitioner has not pointed to any specific language incorporating the specification or disclosure filed in the prior application into this application. The mere reference to another application is not an "incorporation" of anything therein into the application containing the reference. See In re Seversky, 177 USPQ 144, 146 (C.C.P.A. 1973) and dart industries, inc. v. Banner, 207 USPQ 273, 276 (D.C. Cir. 1980). Additionally, it should be noted that the #5 box for Incorporation By Reference on the Utility Patent Application Transmittal, submitted February 3, 2004, was not marked.

The Patent and Trademark Office (Office) file is the official record of the papers originally filed in this application. A review of the official file reveals Figures 3I and 3J were omitted. Since Figures 3I and 3J and the replacement page containing Figures 3I and 3J, were not a part of the papers filed February 3, 2004, the application cannot be accorded the February 3, 2004 filing date with either of the Figures as part of the original disclosure of this application. As such, the petition must be dismissed.

However, petitioner states, "if the [petition] is not granted, please accept the sheet of drawings submitted and grant the filing date of the receipt thereof by the United States Patent and Trademark Office."

Accordingly, the filing date of the above-identified application shall be the date the date of submission of Figures 3I and 3J, June 16, 2004.

The application is entitled to a filing date of June 16, 2004, the date of receipt of Figures 3I and 3J.

The application will be forwarded to The Office of Initial Patent Examination for further processing with a filing date of June 16, 2004, using the copy of Figures 3I and 3J, submitted on that date.

Telephone inquiries should be directed to the undersigned at (703) 306-9200.

A handwritten signature in dark ink, appearing to read 'E. J. Tannouse', followed by a horizontal line extending to the right.

Edward J. Tannouse
Senior Petitions Attorney
Office of Petitions
United States Patent and Trademark Office